INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Battle v. *United States*, 209 U. S. 36	10
Bird v. *United States*, 187 U. S. 118	10
Cornes, v. *United States*, 119 F. (2d) 127	11
Dowling Bros. Distilling Co. v. *United States*, 153 F. (2d) 353, certiorari denied, *sub nom. Gould* v. *United States*, 328 U. S. 848	12
Grace v. *United States*, 4 F. (2d) 658, certiorari denied, 268 U. S. 702	11
Hamburg-American Steam Packet Co. v. *United States*, 250 Fed. 747, certiorari denied, 246 U. S. 662	11
Hoffman v. *United States*, 68 F. (2d) 101	11
Moore v. *United States*, 150 U. S. 57	12
Morris v. *United States*, 123 F. (2d) 957	11
Powers v. *United States*, 223 U. S. 303	11
Seebach v. *United States*, 262 Fed. 885	12
Strom v. *United States*, 12 F. (2d) 233, certiorari denied, 271 U. S. 683	12
United Cigar Whelan Stores Corp. v. *United States*, 113 F. (2d) 340	12
United States v. *Montgomery*, 126 F. (2d) 151, certiorari denied, 316 U. S. 681	11
United States v. *Skidmore*, 123 F. (2d) 604, certiorari denied 315 U. S. 800	12
United States v. *Turley*, 135 F. (2d) 867, certiorari denied, *sub nom. Burns* v. *United States*, 320 U. S. 745	10

Statutes:

Servicemen's Dependents Allowance Act of 1942 (Act of June 23, 1942, c. 443, Title I, § 119, 56 Stat. 381, 385)	2, 3
Act of October 26, 1943, c. 281, § 11, 57 Stat. 577, 580, 37 U. S. C., Supp. V, 219	3

770942—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 457

ROBERT H. POLK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was filed by the Circuit Court of Appeals, but its judgment (R. 327) recited that it appeared "that the verdict of the jury was sustained by the evidence, and that there was no error on the trial or in the proceedings before the district court."

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 27, 1947 (R. 327). The petition for a writ of certiorari was filed November 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's verdict that petitioner charged or received any money as compensation for assisting in obtaining family allowances under the Servicemen's Dependents Allowance Act.

2. Whether the trial judge erred in instructing the jury or in refusing petitioner's proffered instructions in respect of the above question.

3. Whether, after petitioner testified that as a matter of practice he did not charge for services under the Act, the trial court erred in admitting testimony of other persons who had been charged by petitioner for such services.

4. Whether the trial court erred in refusing petitioner's proffer of testimony by clients other than those referred to in the indictment that he had never charged them for services in obtaining allotments.

5. Whether the trial court erred in denying petitioner a new trial sought on the grounds of newly discovered evidence allegedly reflecting upon the credibility of government witnesses.

STATUTES INVOLVED

The Servicemen's Dependents Allowance Act of 1942, as originally enacted (Act of June 23, 1942, c. 443, Title I, § 119, 56 Stat. 381, 385), provided in pertinent part:

> No part of any amount paid pursuant to the provisions of this title shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with any family allowance payable under this title, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than $100 nor more than $1,000.

As amended, the foregoing statute provided in pertinent part (Act of October 26, 1943, c. 281, § 11, 57 Stat. 577, 580; 37 U. S. C., Supp. V, 219):

> Any person who shall, directly or indirectly, solicit, contract for, charge, or receive or shall attempt to solicit, contract for, charge, or receive any fee or compensation for assisting in any manner an enlisted man or dependent in obtaining a family allowance payable under this title, shall, upon conviction thereof, be guilty of a misdemeanor and for each and every offense shall be punishable by a fine of not less than $100 nor more than $1,000 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

STATEMENT

On August 14, 1945, an indictment in four counts was filed in the District Court for the

Middle District of Tennessee charging that petitioner, a practicing attorney of Williamson County, Tennessee, violated the Servicemen's Dependents Allowance Act of 1942 by charging or receiving certain sums of money for services in obtaining family allowances thereunder (R. 1–5). Counts 1 through 3, charging violations of the original act (*supra*, pp. 2–3), alleged that on January 5, April 29, and August 1 of 1943, petitioner received certain moneys from Dora Thelma Deal (count 1) and Ellen Beard King (counts 2 and 3) out of amounts paid to them under the Act and "on account of services rendered by him as agent or attorney in connection with the family allowance payable to" them under the Act as dependent wives of enlisted men in the Army (R. 2–3). Count 4, charging a violation under the amended statute of October 26, 1943 (*supra*, p. 3), alleged that on March 1, 1944, petitioner charged and received from Ellen Beard King a fee "for assisting her to obtain a family allowance" of the same character (R. 4).

After a jury trial, petitioner was found guilty on all four counts of the indictment (R. 14–15, 245–246). He was sentenced to pay a fine of $500 on each of the four counts and to imprisonment for one year on the fourth count (R. 15–16, 21–22, 264). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 327), without opinion.

The evidence in support of the conviction may be briefly summarized as follows:

The victim referred to in count 1, Thelma Deal, testified: As of 1943 she was married to one Elton Herman Deal, who was then serving in the Army of the United States (R. 36). In that year, with petitioner's advice and assistance, she applied for an allotment from the United States Government because of her husband's military service and when she asked petitioner how much he would charge for his services in connection with the application "he said he would be reasonable" but did not set any specific figure (R. 38). Subsequently when she received from the Government a $350 check dated January 30, 1943, she brought it to petitioner, as he had instructed her, and he cashed the check after she had endorsed it (R. 39). In response to her inquiry as to his fee, petitioner told her that "for all such matters he charged a third of what the check was" and he gave her $235 from the $350 check, keeping $115 for himself (R. 40).

The victim referred to in the remaining three counts, Ellen Beard King, testified: She was married to one Jasper King who was serving in the Army of the United States (R. 53–54). Petitioner advised and assisted her in obtaining necessary papers for an allotment and he filled them out and mailed them (R. 55–56). On a number of different occasions petitioner wrote her advising that there were checks for her at his office. Each time when she went to his office, he said there was a Government check for her, and he opened the letter, turned the check face down so

that she could not see it and had her endorse it. He then went out of his office and cashed the check and returned and gave her certain money. She received $40 on each of eight different visits in 1943 and $60 on each of three in 1944. Mrs. King identified indorsements on the back of eight Government checks in the amount of $62 each and dated the first days of April, and June through December 1943, and those on three Government checks in the amount of $80 each and dated the first days of January through March 1944, as her's and petitioner's. (R. 56–64.) During March 1944, she had discussed the amount of her allotment with people with whom she was living and someone went with her to see petitioner about the matter, but he was not in his office at the time. The next month (April 1944) petitioner mailed the allotment check to her which she cashed for the full face amount of $80. (R. 64–65.) One Rosalie Peach, a lifelong friend of the witness King (R. 90–91), testified that she accompanied Mrs. King on several occasions to petitioner's office and that when Mrs. King came out and counted the money she had only $40 (R. 91–92).

At the close of the Government's case in chief, petitioner took the stand and, after admitting that he had assisted the witnesses Deal and King in connection with their family allotments, he denied that he had said anything to Deal about charging for his services or that he had taken any compensation from either of these women for his services

or withheld any of the moneys from their allotment checks (R. 100-115). Petitioner also testified that it was not his custom to charge for such work and that he had handled dozens of such matters without any charge whatsoever (R. 102). Essentially the same assertions were made by petitioner's secretary testifying for the defense (R. 140–146). The defense also sought to call seventeen other witnesses for whom petitioner allegedly had prepared allotment papers to show he had not charged them for such services, but, on objection by the prosecutor, the proffer was refused by the trial court (R. 135–137, 266–269). In rebuttal the Government, over petitioner's objection, called Mrs. O. B. Skinner and Mrs. Thelma Tomlin. Mrs. Skinner, whom petitioner's secretary had testified she did not know (R. 156), testified that in December 1943, petitioner had assisted her in applying for an allotment and that he charged her $15 for this service which she paid to his secretary (R. 202–203). She identified in evidence three receipts for $5 each which were given her for these payments (R. 203–204, 206). Petitioner rendered no other services for Mrs. Skinner (R. 202). The witness also testified that petitioner's secretary told her that petitioner charged $25 for those allotment matters with which he had any trouble (R. 205). Mrs. Tomlin testified that in 1943 petitioner helped her get an allotment and filled out allotment papers for her, and that he charged her $15 for this service which

she paid to his secretary in two installments of $5 and $10. She also identified for introduction in evidence two receipts on petitioner's bill head, and signed by his secretary, reading, "For Services in Allotment" which she stated were given her for these two payments. (R. 212–214.)

Following his conviction, petitioner moved for a new trial (R. 16–21, 283–291) on the following principal grounds: (1) that the court had committed several errors, in the course of the trial (discussed in Argument, *infra,* points 1–4); (2) that he had discovered since his trial that the Government's rebuttal witnesses, Mrs. O. B. Skinner and Mrs. Tomlin, had never applied to the Government for family allotments, but that allotments for each of them had been applied for by their soldier husbands; and (3) that he had obtained evidence from the husband of the complaining witness, Ellen Beard King, showing that, subsequent to the trial, she had admitted she had testified falsely. After full hearing (R. 248–265, 294–321), these motions were denied (R. 21–22, 293).

ARGUMENT

1. Petitioner, conceding (Pet. 32) that there was substantial evidence to support his conviction on count 1 (based on his transactions with Dora Thelma Deal), contends that there was insufficient evidence to support the convictions on counts 2, 3, and 4 (based on his dealings with Ellen Beard King) (Pet. 2, 27, 31–36). He

argues that the evidence adduced by the Government shows at most that he was guilty of larceny by trick, embezzlement or fraudulent breach of trust in withholding from Mrs. King part of the money from her allotment checks, but that, since no fee or compensation agreement was made or discussed, the evidence does not show he charged or received any fee or compensation from her within the statutory proscription. We submit, however, that the mere statement of petitioner's argument demonstrates its weakness. The statute, both as originally enacted (counts 2 and 3) and as amended (count 4), prohibits, *inter alia,* the receipt of compensation on account of allotment services, and the amended statute reaches any such act done directly or *indirectly.* The fact that petitioner and Mrs. King may not have discussed fees, does not obviate the fact necessarily implicit in his dealings with her that he withheld and thus *received* moneys from her allotment checks on account of his services in connection therewith. Certainly, the evil legislated against is as pronounced whether a fee arrangement is expressed or implied. If, in fact, petitioner believed that the moneys were not withheld as compensation for his services in the allotment matter, but solely through larceny by trick, embezzlement or fraud, that was a matter of defense which should have been advanced by evidence at the trial to overcome the clear implication which the jury could, and necessarily did, draw to the contrary. However, as we have already shown

in the Statement, no such defense was made, petitioner having been satisfied to rely solely on his denial that he withheld any money. Finally, it should be noted that petitioner did not save any question as to the sufficiency of the evidence by moving for a directed verdict. (See Index to Record and R. 235, 245; Pet. 31.)

2. Petitioner next contends (Pet. 2–4, 29, 37–40) that the trial judge erroneously instructed the jury and refused proffered instructions in clarification so that (Pet. 39) "the jury was told [in effect] that it was its duty to return a verdict of guilty on the last three counts if they found that the defendant received any of the proceeds of Government checks to Ellen Beard King, whether he received it as a fee in another matter, or whether he obtained it as a result of larceny or embezzlement, or in any other manner."

For reasons similar to those advanced in point 1 above, this contention is likewise without merit, for petitioner's only evidentiary defense was that he had not withheld any money from Mrs. King's allotment checks. Consequently, even if, under the statute, it might be argued that withholding for other purposes or through larceny, embezzlement or fraud is a good *theoretical* defense, the evidence adduced presented no such *real* defense and the trial judge properly, therefore, refused to inject such an issue into his instructions to the jury. See, e. g., *Battle* v. *United States,* 209 U. S. 36, 38; *Bird* v. *United States,* 187 U. S. 118, 132–133; *United States* v. *Turley,* 135 F. (2d) 867,

869–870 (C. C. A. 2), certiorari denied, *sub nom. Burns* v. *United States,* 320 U. S. 745; *Grace* v. *United States,* 4 F. (2d) 658, 661–662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Hamburg-American Steam Packet Co.* v. *United States,* 250 Fed. 747, 765 (C. C. A. 2), certiorari denied, 246 U. S. 662.

3. Petitioner contends that it was error to admit the testimony of Mrs. Skinner and Mrs. Tomlin in rebuttal because evidence tending to show petitioner had committed other crimes wholly independent of that for which he was on trial is inadmissible (Pet. 4–5, 28, 29, 41–47).[1] However, while the general rule is as asserted by petitioner, the testimony in question was clearly admissible on two independent grounds. It was admissible as an exception to the rule because it showed the performance of acts by petitioner similar to those with which he was charged and, therefore, was fairly cognate to his intent in his relations with the victims referred to in the indictment. See, e. g., *Powers* v. *United States,* 223 U. S. 303, 315–316; *Morris* v. *United States,* 123

[1] In this connection, petitioner also contends that the order of proof thus allowed was improper. But the law is well settled that the order of reception of evidence is a matter addressed to the discretion of the trial court and that no grounds for reversal are presented by reason of the admission of evidence in rebuttal which could have been admitted in chief. *United States* v. *Montgomery,* 126 F. (2d) 151, 153 (C. C. A. 3), and cases cited, certiorari denied, 316 U. S. 681; *Cornes* v. *United States,* 119 F. (2d) 127, 130 (C. C. A. 9); *Hoffman* v. *United States,* 68 F. (2d) 101, 103 (C. C. A. 10).

F. (2d) 957, 959 (C. C. A. 5); *United Cigar Whelan Stores Corp.* v. *United States,* 113 F. (2d) 340, 347 (C. C. A. 9); *Seebach* v. *United States,* 262 Fed. 885, 887 (C. C. A. 8). It was also admissible to rebut the testimony of petitioner and his secretary that it was not his custom to charge for services in securing allotments and to reflect upon their credibility. See, e. g., *Seebach* v. *United States,* 262 Fed. 885 (C. C. A. 8); *Strom* v. *United States,* 12 F. (2d) 233, 234 (C. C. A. 6), certiorari denied, 271 U. S. 683; *United States* v. *Skidmore,* 123 F. (2d) 604, 610 (C. C. A. 7), certiorari denied, 315 U. S. 800; *Dowling Bros. Distilling Co.* v. *United States,* 153 F. (2d) 353, 361 (C. C. A. 6), certiorari denied, *sub nom. Gould* v. *United States,* 328 U. S. 848. Moreover, since petitioner himself first opened up the question as to his custom in such matters, he cannot now be heard to complain that the Government's evidence in rebuttal was collateral, particularly since the rebuttal testimony could have been offered in chief on the issue of intent. It is clear, therefore, that since the rebuttal evidence was competent, it was not rendered inadmissible merely because it tended to show that defendant was guilty of other offenses than those charged. *Moore* v. *United States,* 150 U. S. 57; *Dowling Bros. Distilling Co.* v. *United States, supra.*

4. Petitioner's contention that the trial court erred in refusing his proffer of testimony by other persons whom he had assisted in obtaining allotments to the effect that he had not charged them

for such services (Pet. 5, 28, 29, 47–48), is also without merit, for, as the prosecutor pointed out in objecting to the admission of that testimony (R. 136), the mere fact that in some instances it might be shown petitioner made no charge for his services, laid no basis for any inference as to what he did in others, and consequently the evidence lacked probative value to make it material.

5. Finally, petitioner contends that he was entitled to a new trial on the basis of newly discovered evidence that the Government's rebuttal witnesses, Skinner and Tomlin, had not applied for allotments and that the complaining witness, King, had falsely testified (Pet. 5–7, 28, 30, 48–49). We submit, however, that in the circumstances here it cannot be said that the trial judge abused his discretion in denying the motion for a new trial. The only pertinent evidence offered by the motion in support of the allegations as to Skinner and Tomlin were letters from certain Army officials that these persons had never applied for family allotments and that the allotments were applied for by their husbands. But that evidence would not have proved that petitioner had not done some work for either of the wives in connection with the applications by their husbands or in preparing necessary supporting documents (see, e. g., R. 225, 227). Additionally, the absence of any denial by petitioner as to dealings with these women in connection with family allotments is apparent. As to the question of alleged perjury by the complaining witness, King, we find

nothing in the record to overcome the statement of the trial judge, in his order denying the motion (R. 293):

> In support of the motions, the Court heard the testimony of Jasper King and Noble King. Ellen Beard King testified for the Government. The Court was not favorably impressed with the testimony of Jasper King and Noble King or their appearance on the witness stand. On the other hand, the said Ellen King testified in the same straightforward manner as she had done in the previous trials of this case, and her testimony was not in any manner impeached or shaken by cross-examination.
>
> Having heard the witnesses, the Court is of the opinion that said Ellen King is entitled to more credibility than either of the two witnesses Jasper or Noble King.

CONCLUSION

The conviction and judgment below are clearly correct and the petition for a writ of certiorari presents no substantial question in respect thereof. We respectfully submit, therefore, that the petition should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

DECEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947